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No. 92-446

In The

Supreme Court of the United States

October Term, 1992

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, and VERNIE RHODES, JR.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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1. The question presented for review – whether employees who seek to disavow ADEA releases are required, as a precondition to suit, to return the benefits they received in exchange for such releases – does not depend on whether the releases were voluntary or involuntary. (Brief in Opp., p. 8) Nor does it turn on whether the releases were obtained by fraud, misrepresentation or duress. Those are issues that will be decided, as Respondents concede (id., p. 9), only after trial. The question here is whether such a trial should occur when the plaintiffs retain the valuable consideration they received in

exchange for relinquishing the right to go to trial. Once a trial occurs, the defendant has lost the benefits for which it bargained. The plaintiffs, however, continue to retain the benefits of that very same bargain. If plaintiffs wish to sue, after they enter into releases and receive enhanced benefits, that is their right. They can then nullify the release by demonstrating it was procured by fraud, duress or misrepresentation. But they must first tender back the benefits they received for the release. If the employer rejects the tender, suit may proceed on the validity of the releases. If the employer accepts the tender, the parties are restored to the status quo ante. The employees may then sue unimpeded by the releases. The court below did not follow this approach; it permitted the Respondents to have it both ways. Nothing in the ADEA, as *Grillet* and *O'Shea* recognized, compels that incongruous result.

Respondents' *ex post* perspective – *i.e.*, given fraud, an employee should be entitled to disavow a release – misses the point. The real question is whether, *ex ante*, employers will offer enhanced benefits if there is a real likelihood such benefits will later be used, with impunity, to finance an ADEA lawsuit. This policy issue is of national significance.

2. Respondents also err in asserting there is no conflict in the circuits. They concede that "the results reached by the Fifth and Fourth Circuits in *Grillet* and *O'Shea*, respectively, were contrary to the result reached by the Eleventh Circuit in the instant case." (Brief in Opp., p. 7.) Nevertheless, they contend that no true conflict exists because the other circuits never considered this Court's decision in *Hogue v. Southern Railway Co.*, 390 U.S. 516

(1968). (Brief in Opp., p. 7.) Respondents' position is specious. *First,* it is pure speculation whether the Fifth and Fourth Circuits failed to consider *Hogue* or whether, as appears more likely, they simply rejected it as irrelevant in the discrimination law context. *Hogue* is a 24 year old opinion which was equally available to the other circuits which have addressed this issue. This is not an instance where a recent decision of this Court renders moot an apparent conflict between appellate decisions rendered before and after this Court's pronouncement. *Second,* Respondents overstate the impact of *Hogue* upon the decision of the court below. The Eleventh Circuit stated unequivocally as follows:

> We agree with, and find persuasive, the reasoning set forth in *Isaacs* that explains public policy considerations supporting our determination that the Retirees should not be required to tender their retirement benefits back to Sears as a prerequisite to the maintenance of their lawsuit. 765 F.Supp. at 1366-68.

App. A, p. A11. It is thus clear that the Eleventh Circuit disagreed with *Grillet* and *O'Shea* on fundamental policy grounds. This is a quintessential example of a conflict in the circuits which must be resolved.

Respectfully submitted,

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